AUG 21 1956
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Supreme Court of the United States

OCTOBER TERM 1955

No. 338

PAULINE CONTRERAS BARRIENTES,
PETITIONER

versus

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Supreme Court of the United States

OCTOBER TERM 1955

PAULINE CONTRERAS BARRIENTES,
PETITIONER

versus

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Pauline Contreras Barrientes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause, No. 15935, on June 28, 1956.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is set forth in the appendix hereto. It is not yet officially reported.

GROUNDS OF JURISDICTION

(i) The judgment of the United States Court of Appeals, Fifth Circuit, sought to be reviewed, was entered on June 28, 1956.

(ii) The Petition for rehearing in the Court of Appeals was denied without opinion, by order entered July 24, 1956.

(iii) Jurisdiction to entertain this petition is conferred by Title 28, U.S.C., Sections 1254 (1) and 1651 (a).

The Court of Appeals, Fifth Circuit, has decided an important question of federal law which has not been, but should be, settled by this Court. The opinion holds that the use of non-excessive force in the execution of a search warrant does not affect the admissibility of the evidence obtained thereby. No decision has been found in which the United States Supreme Court has passed upon this question. The decision of this question is important to the rights of persons against unreasonable search and seizure, and to the construction of the Federal statutory provisions governing execution of search warrants. The question should be settled by this Court.

The Petitioner believes the true question to be different from the question as stated and decided by the Circuit Court. The Petitioner believes and here asserts that the question for decision is whether federal officers, and state officers acting with them, must strictly comply with the provisions of Section 3109, Title 18, U.S.C., in execution of a search warrant, and give notice of their authority and purpose before breaking open any door of a house.

The decision of the Court of Appeals, while not in direct conflict with other decisions on the direct question, in principle goes contrary to the decisions of the Supreme Court and Circuit Courts requiring strict adherence to

the procedural requirements of Federal law in criminal cases generally and in the use of search warrants in particular, and this question merits this Court's consideration.

QUESTIONS PRESENTED

The question presented for review is whether, in a federal prosecution for unlawful purchase and possession of narcotic drugs, evidence is admissible against the Petitioner which has been obtained by a Federal officer pursuant to a search warrant, where the officers broke open the doors and entered the home of Petitioner without first giving notice of their authority and purpose, as is required by Section 3109 of Title 18, U.S.C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV, Searches and Seizures:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Code, Title 18, Section 3109, Breaking Doors for Entry or Exit:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. June 25, 1948, c. 645, 62 Stat. 820"

Statement of the Case

The Petitioner was convicted in the United States District Court, Western District of Texas, on an indictment in three counts charging purchase and possession of heroin, in violation of U. S. Code, Title 18, Section 545, Title 21, Sections 173 and 174, and Title 26, Section 4704 (a).

A Federal narcotic agent procured a search warrant, and in company with other Federal narcotic agents and police officers of the City, went to the Petitioner's house. Some of the city police officers were at the front door, and the federal agent having the warrant and a city police officer together with another federal agent, went to the rear door. The city police officer approached the rear door ahead of the federal officers and knocked. According to testimony of the federal officer the door fell open when it was knocked upon, and all three officers rushed in. The city police officers at the front door at the same time knocked there and, without waiting for a reply, broke the glass door and opened it and came in. (page 32, transcript of record).

They found the husband of Petitioner eating at a kitchen table, and Petitioner came in the kitchen as the officers entered. A search of a washing machine disclosed the narcotics that were later introduced in evidence over objection.

All the officers testified that there was no notice given to the occupants of the house of the authority or purpose of the officers, prior to entry by either group of officers. Both groups entered by breaking open the doors of the house.

At the trial the evidence seized at the house was received in evidence over timely objection by petitioner. The ground of objection was the unlawful execution of the search warrant by breaking open the doors in violation of the requirements of Section 3109, Title 18, United States Code.

ARGUMENT

It is submitted that the question presented is important to the enforcement of the federal statutory provisions governing search warrants, and to the protection of persons against unreasonable search and seizure.

The question has not been decided by this Court, and should be settled.

The decision of the Circuit Court runs contrary to the settled principle of strict adherence to procedural requirements by Federal Officers. Evidence obtained contrary to these requirements is not admissible.

This Court in the very recent case of *Rea vs. United States*, decided January 16, 1956, reported Volume 76, Supreme Court Reporter, page 292, opinion by Justice Douglas, held:

> "The Federal Rules are designed as standards for Federal agents. Federal Courts sit to enforce Federal law; and Federal law extends to the process issuing from those Courts. The obligation of the Federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for Law Enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the Federal agent can flout them and use the fruits of his unlawful act either in Federal or State proceedings."
>
> "A Federal agent has violated the Federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. The power of the Federal Courts extends to policing those requirements and making certain that they are obeyed."

In the case of *Accarino vs. United States*, by the Court of Appeals, District of Columbia, 179 F. 2nd 465, recogni-

tion of the question here involved is made, for the Court there said:

> "Before an officer can break open a door to a home he must make known the cause of his demand for entry * * *"

The same Circuit Court in *Gatewood vs. United States*, 209 F. 2nd, 789, held, where the evidence showed that the officers gained entrance through false pretenses as well as force, that:

> "Upon that clear ground alone as we said in the Accarino opinion, the breaking of the door was unlawful, the presence of the officers in the apartment was unlawful."
>
> The Court further stated, "For even if an officer is armed with a warrant of arrest for a person he believes is in another's home, he may not lawfully break and enter the house to make the arrest unless he first discloses his true purpose to the inmates of the house and is refused admittance."

The question of the meaning of the word "break open" as used in Section 3109, Title 18, has never been decided by this Court. There is authority that it means *any* opening of a door, and we submit it has special importance when the sanctity of the home is involved.

Words and Phrases, Volume 5, page 780, under "Opening closed door" carries this definition:

> "As used in a law forbidding a forcible breaking by a Sheriff holding civil process, does not mean a positive breaking, or the removal of some extraordinary fastening, but includes merely lifting the latch and thus opening the outer door, it is enough that the outer door be shut. Merely opening is a 'breaking' within the meaning of the law."

Further importance of the question is to be found in the fact that the rights of persons to defend their homes is involved, and it could well be one of the reasons for the statutory requirement of notice before breaking and entering under a search warrant. Every person is entitled to defend his home against aggressions and invasions of privacy, and to use force in repelling such, and if officers ignore the plain mandate of the statute they are themselves creating a situation where there could be unnecessary injury or death inflicted, which would be prevented if notice is given as required.

In the case of [illegible] v. Commonwealth, Volume 61, American Decisions, page 13, the Court held:

> "Otherwise it would [illegible] for one to know what the officer [illegible] the person breaking open the door might [illegible] the owner has a right to consider it a [illegible] on his private property which may [illegible] to the utmost."

CONCLUSION

It is submitted that the entry into Petitioner's home was in violation of Section 3109, Title 18, U.S.C., and therefore an unreasonable search and seizure in violation of the 4th Amendment of the United States Constitution, and that the evidence was illegally obtained and therefore was inadmissible, and that the ruling of the trial court and the Judgment of the Circuit Court was in Error.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court herein, being the case

numbered and entitled in its docket as: "Pauline Contreras Barrientes, Appellant vs. United States of America, Appellee, No. 15935", and that the judgment of the Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: August 15, 1956.

.....

Petitioner

.....

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Attorney for Petitioner

With him on the Petition:

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APPENDIX

OPINION BELOW:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15935

PAULINE CONTRERAS BARRIENTES, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Western District of Texas.

(June 28, 1956)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

PER CURIAM: Found guilty by a jury of, and sentenced for, violations of the narcotics laws of the United States, the defendant is here assigning as error: (1) the admission of the narcotics into evidence over the objection of defendant that the search warrant was illegally served; and (2) the denial of her motion for an instructed verdict.

The ground of the first claim is that the officers who seized the narcotics under a search warrant did not serve it in accordance with, but in violation of, Sec. 3109, Title 18 U.S.C.,[1] in that, though they were not refused admittance, they nevertheless broke in the door and entered by force, and that, under *Accarino v. United States*, 179 F (2) 465, and *Gatewood v. United States*, 209 F (2) 789, such service was illegal.

The ground of the second claim is that there was no evidence connecting her with possession of the narcotics, and that there was evidence: that she was not at home at the time when, according to her husband's testimony, the package of narcotics was brought to the house; that she was not told that it was hidden in, and she did not know that it was in, the washing machine.

Of the first ground, it suffices, we think, to say that: the section invoked by defendant does not provide, the cases cited by defendant do not hold, and we have found none holding, that the use of excessive force in serving a search warrant, such as is claimed was used in this case, will invalidate a search and seizure made under it; and that, while the use of excessive, that is unnecessary, force is in any case to be deprecated, evidence obtained under a valid warrant is not thereby made inadmissible.

The second point is no better taken. The evidence shows without contradiction that when the officers pulled out of the washing machine, where the defendant was standing, the sack containing the narcotics, she told the officers, "That isn't his, that's mine". It is significant, too, that it

---

[1] "The officer may break open any outer or inner door or window of a house, or any part of a house or anything therein, to execute a search warrant if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." Sec. 3109, Title U.S.C.

was she and not her husband who was the first to go to the washing machine, and that, as the officer walked over to the old washing machine, took the lid up, and started to reach in it, she started pulling the clothes out, and the officer said to her, "Just hold it, I will reach into the washing machine and pull the clothes out." Upon this evidence and the other evidence in the case, including her own testimony that she claimed the narcotics to protect her husband, and that she was at the washing machine because her soiled clothes were in it and she didn't want the officer to see them, the question of her guilt was certainly a question for the jury.

No reversible error appearing, the judgment is AFFIRMED.

RIVES, Circuit Judge, Concurring Specially:

It seems to me that we do not reach the question of whether the use of excessive force in serving a search warrant will invalidate the search and seizure, because the testimony of the federal narcotic agent, which the district court had a right to believe, showed that there was no such excessive force.[1]

---

1 "A. That afternoon, or rather that morning, I and Agent Bromley had obtained a federal search warrant and about 2:15 p.m. the same day we went to 1322 San Carlos Street accompanied by Agents Hooper and Hazur, Hobson and Detective Lieutenant of the City Police Department Hutton, and Detective Sergeant Saenz went along to serve the federal search warrant. Detective Saenz and Agent Hooper and myself went to the rear door and made entry there where we served the search warrant.
"Q. Who was present when you entered the room?
"A. Sergeant Saenz—oh, you mean the defendant?
"Q. In the home.
"A. In the home, in the kitchen the defendant Barrientes was sit-

I, therefore, concur specially.

BROWN, Circuit Judge:

I concur fully in the result and all that is said under Ground Two. I join Judge RIVES as to the First Ground.

---

ting at the table; his wife I believe came into the room just as we came in.

"Q. Did you advise them who you were?

"A. Yes, that we were narcotic agents serving a search warrant.

"Q. Did you tell them what you wanted?

"MR. TIJERINA: At this time, Your Honor, may I have the witness on voir dire, may it please the Court?

"THE COURT: Yes, sir.

"*Questions by Mr. Tijerina on Voir Dire:*

"Q. Agent Dean, who had the search warrant—did you have the search warrant?

"A. I had the search warrant in my pocket, sir.

"Q. And you went through the back door?

"A. Yes, sir, Sergeant Saenz went in first, I went in second.

"Q. Sergeant Saenz broke the door or did you break the door?

"A. Sergeant Saenz knocked on the door and it fell open and he fell, I think, almost into the kitchen, and I came in right behind him.

"Q. And you say that broke the door down and it fell in?

"A. It didn't break the door down, sir; it just swung open. It was a very flimsy door.

"Q. And you did not ask; you just went into the house then?

"A. Yes, sir, went right into the house.

"Q. And that is when you presented your search warrant?

"A. Yes. I think Sergeant Saenz told everybody to remain standing, that we had a search warrant, and Sergeant Saenz remained in the kitchen and I ran into the bathroom into the toilet to make sure there was nobody in the toilet.

"Q. Before you knocked on the door did you call to anybody in the inside and identify yourself as a federal agent?

"A. Not before knocking, no, sir.

"Q. Did you call toward the inside and tell anybody or give notice to anybody that you were there with a federal search warrant?

"A. Not standing outside of the house, sir.

"Q. Not until you were inside the house?

"A. It was inside of the house.

"MR. TIJERINA: May it please the Court, at this time the defendant is going to object to any testimony by this witness on the ground that he was there illegally; he was there by virtue of a search warrant, and I think that he is bound by the search warrant and under the law it states that the door may be broken when admission is refused. The federal agent must first notify that he is there by virtue of the search warrant and if he is refused, the door then may be opened by the federal agent.

"THE COURT: That will be overruled, counsel.

"MR. TIJERINA: Note our exception to the Court's ruling."

A True Copy:
Teste:

(SEAL)

JOHN A. FEEHAN, JR., Clerk

By CLARA R. JAMES

Clerk of the United Deputy Court of
Appeals for the Fifth Circuit.

JUDGMENT BELOW:

JUDGMENT

Extract from the Minutes of June 28th, 1956.

No. 15935

PAULINE CONTRERAS BARRIENTES,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives and Brown, Circuit Judges, concurring specially."

* * * *

ORDER DENYING REHEARING:

ORDER DENYING REHEARING

Extract from the Minutes of July 24th, 1956.

No. 15935

PAULINE CONTRERAS BARRIENTES

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * *

ORDER STAYING MANDATE:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15935

PAULINE CONTRERAS BARRIENTES, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from July 24, 1956, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from July 24, 1956 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall

issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from July 24, 1956, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 4th day of August, 1956.

/s/RICHARD T. RIVES,
United States Circuit Judge.

(ORIGINAL FILED: August 4th, 1956.)

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398752—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 338

PAULINE CONTRERAS BARRIENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 89–93; Pet. 9–13) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 94; Pet. 14). A petition for rehearing (R. 95–101) was denied on July 24, 1956 (R. 102; Pet. 15). The petition for a writ of certiorari was filed on August 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether federal officers used excessive force in executing a search warrant.

STATUTE INVOLVED

18 U. S. C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

In the United States District Court for the Western District of Texas, petitioner was convicted on a three count indictment charging narcotic violations, and was sentenced generally to three years and a hundred-dollar fine (R. 71–74).

In this Court, petitioner raises only the issue of the validity of the search by which the narcotics were obtained. Prior to trial, petitioner made no motion to suppress, but she moved to exclude the evidence after the officers had testified (R. 10, 38). The evidence on this issue may be summarized as follows:

A federal narcotics agent obtained a search warrant for petitioner's house. In the early afternoon of November 30, 1955, federal officers, accompanied by city police officers, approached the front and rear doors in separate groups (R. 8, 31, 35). Officer Saenz in the rear-door group knocked on the door which was very flimsy, and "it fell open and he fell * * * almost into the kitchen" (R. 9). The two federal officers in this group followed Saenz into the room, and announced that they had a search warrant (R. 9).

A copy of the warrant was presented to petitioner (R. 17, 51).

One officer immediately went through to the bathroom to prevent possible quick disposal of the narcotics in the toilet (R. 9, 16). As the officers entered, petitioner, her husband, and another woman were in the kitchen (R. 8, 16, 17, 24, 27, 33, 36) and a third woman and a child were in the middle room which lay between the kitchen and living room (R. 8, 16, 17, 24, 27, 32, 33, 36). Under some clothing in a washing machine in the kitchen, one of the federal officers who had entered by the rear door found a package of heroin (R. 10) which petitioner and her husband each claimed (R. 12, 13, 24). Additional heroin was found in a cookie jar by another officer who had entered through the rear door (R. 25).

The officers who had gone to the front pounded on the frames of two doors at the front of the house (R. 31, 32). After thirty to sixty seconds of unanswered knocking, a city police officer kicked the door and attempted to force it with his shoulder (R. 32). Failing still to receive a response, or to budge the door, he put his elbow through a pane of glass in the door, reached through, and opened it (R. 32). Petitioner's testimony on this point was that she was sick in bed in the middle room and got up when she heard the officer "fall down" as he entered the kitchen (R. 50). She said that she heard no knocking but only the sound of the kicking and the breaking glass (R. 50).

Although the *per curiam* opinion of the Court of Appeals affirming the conviction expresses the view

that the use of excessive force in serving a search warrant will not invalidate the search (Pet. 10), two of the three judges concurred in the result on the ground that the question of the effect of a search with excessive force need not be reached since the testimony showed that there was no excessive force here (Pet. 11–13).

ARGUMENT

As the majority of the court below held, the question raised by petitioner, as to the effect of excessive force in gaining entry to execute a search warrant, is not actually presented by this case.

With respect to the entrance made at the rear door, the record shows that at the officer's knock the door fell open so easily as to cause him to stumble over the threshold (R. 9). Thus, there was neither a refusal of admittance nor a breaking. The federal officers then immediately identified themselves and presented petitioner with a copy of the search warrant. The officers who entered at the rear were those who found the heroin. A lawful entrance was thus accomplished wholly independent of, and prior to (see R. 32), the happenings at the front door.

Even assuming, *arguendo,* that the breaking of the glass on the front door could be deemed excessive use of force in view of the fact that the rear door was open,[1] this subsequent trespass would not in-

[1] Considered independently of the events in the rear, the entrance at the front door was legally effected. The demand of admission with notice of authority, prior to forcing a door, presupposes some contact with someone on the premises. Blank

validate the original lawful entry and the search which followed it. *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563; *McGuire* v. *United States,* 273 U. S. 95.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

SEPTEMBER 1956.

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silence, either because the occupant fails to respond to the knock, or because he has absented himself from the premises, is tantamount to a refusal to admit any caller, regardless of his errand or authority, and justifies a breaking of the door by officers holding a valid search warrant. Here, the officers pounded on the door and then made efforts to force the door before they broke the glass. State courts interpreting comparable statutes have ruled that similar situations constituted sufficient compliance with the statutes. *Collins* v. *State,* 184 Tenn. 356; *Thigpen* v. *State,* 51 Okla. Cr. 28; cf. *Hiller* v. *State,* 190 Wisc. 369.

U. S. GOVERNMENT PRINTING OFFICE: 1956